ALLEN C. KROEZE

IBLA 97!115 Decided August 16, 2000

Appeal from a Decision of the Oregon State Office, Bureau of Land Management, declaring two placer mining claims null and void for failing to comply, after notice from BLM, with location and recordation requirements. ORMC!150735 and ORMC!150736.

Affirmed in part, reversed in part.

1. Mining Claims: Location!!Mining Claims: Placer Claims

The Board will affirm a BLM decision declaring a placer mining claim null and void where the claimants, despite notice from BLM, failed to amend or relocate the claim so as to bring it into compliance with the requirements of 30 U.S.C. § 35 (1994) and 43 C.F.R. § 3842.1!2, to conform the claim as near as practicable to the United States system of public!land surveys and to encompass not more than 20 acres per claimant. Where the appellant fails to contravene evidence in the record that the claim was located for more than 40 acres by the two individuals named in the location notice recorded with BLM, and where, though practicable, the claim did not encompass regular subdivisions of that system, the claim will be declared null and void.

2. Mining Claims: Placer Claims!!Mining Claims: Powersite Lands!!Mining Claims: Recordation of Certificate or Notice of Location!!Powersite Lands!!Withdrawals and Reservations: Powersites

BLM improperly declares a placer mining claim located on land subject to a powersite reservation null and void when the claimants, following notice from BLM, failed to submit a location notice properly marked to indicate that it was filed pursuant to the Mining Claims Rights Restoration Act of 1955, as amended, 30 U.S.C. §§ 621!625 (1994), as required by 43 C.F.R. § 3734.1(a), since the failure to do so does not affect the validity of the claim but only when mining may occur on the claimed land.

APPEARANCES: Allen C. Kroeze, pro se.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Allen C. Kroeze has appealed from a Decision of the Oregon State Office, Bureau of Land Management (BLM), dated October 18, 1996, declaring the Liberty 96 and Howson Creek No. 1 placer mining claims, ORMC ! 150735 and ORMC ! 150736, null and void because he failed, despite notice from BLM, to comply with certain requirements regarding the location and recordation of the claims.

On January 8, 1996, BLM received copies of "Notice[s] of Mining Location" for the Liberty 96 and Howson Creek No. 1 placer mining claims. The location notices, which stated that the two claims had been located on December 12, 1995, were filed for recordation with BLM pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1994). 1/ The "Locators" of the claims were identified as Allen C. Kroeze and Charles M. Kroeze, and their signatures appear at the bottom of the location notices in that capacity. 2/

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1/ In a "Claim Journal" dated Feb. 5, 1996, which was filed with BLM on Feb. 8, 1996, Allen C. Kroeze stated that he had erected discovery and corner posts and posted notice on the two claims on Dec. 12 and 13, 1995 (Howson Creek No. 1), and Dec. 21, 1995 (Liberty 96), after he checked BLM's records to determine whether the land was open to entry and walked the ground and took samples. Kroeze also stated that the location notices were recorded with the Kittitas County Auditor on Dec. 20, 1995 (Howson Creek No. 1), and Dec. 22, 1995 (Liberty 96), and then mailed to BLM. Thus, it appears that, under Washington State law, the dates of location of the claims were actually Dec. 13, 1995 (Howson Creek No. 1), and Dec. 21, 1995 (Liberty 96), the dates of posting notice. See WASH. REV. CODE ANN. § 78.08.100 (Michie 1996).

2/ The record establishes that BLM served its October 1996 Decision on Charles M. Kroeze by sending a copy by certified mail, return receipt requested, to his last address of record with BLM, which was the same address as that of Allen C. Kroeze. It was received at that address and Allen C. Kroeze signed for it on Oct. 23, 1996. There is no evidence that Charles M. Kroeze actually received the copy. Nonetheless, he is deemed to have constructively received it on that date. 43 C.F.R. § 1810.2(b); Lloyd M. Baldwin, 75 IBLA 251, 252 ! 53 (1983). There is no indication in the Notice of Appeal/Statement of Reasons for Appeal (SOR) filed by Allen C. Kroeze with BLM on Nov. 22, 1996, that the appeal was taken on behalf of Charles M. Kroeze. Nor was any notice of appeal independently filed by Charles M. Kroeze within 30 days of Oct. 23, 1996, as required by 43 C.F.R. § 4.411(a). We thus conclude that BLM's October 1996 Decision has become final for the U.S. Department of the Interior as to any interest Charles M. Kroeze still has in the subject claims. Robert L. Mendenhall, 127 IBLA 73, 80 (1993).

On a copy of a portion of a U.S. Geological Survey topographic map attached to the location notices, the two claims were shown to be adjacent to the generally north ! south "State Route 903," which parallels the Cle Elum River. With the exception of the western boundaries of each claim, which follow the road, the claim boundaries were shown running in a straight line generally north ! south and east ! west. In "Notice[s] of Intent" dated December 12, 1995, filed with the location notices, the Kroezes further described the claims as being situated "within" the SW¼ sec. 28 and the NW¼ sec. 33, T. 22 N., R. 14 E., Willamette Meridian, Kittitas County, Washington. Such lands, which had been surveyed under the United States system of public ! land surveys, are within the Wenatchee National Forest, which is administered by the U.S. Forest Service (USFS), U.S. Department of Agriculture. The map further noted that the claims encompass 88 acres (Liberty 96) and 112 acres (Howson Creek No. 1).

All of the land in the Liberty 96 claim and much of the land in the Howson Creek No. 1 claim, as denoted on the map attached to the location notices, was reserved by a December 6, 1928, Order of the Secretary of the Interior, as part of Power Site Classification No. 215, pursuant to section 24 of the Federal Power Act, ch. 285, 41 Stat. 1075 (1920), codified as amended at 16 U.S.C. § 818 (1994). That Order reserved all the affected land from entry, location, or other disposal under the laws of the United States, including the general mining laws, and classified it as suitable for use for powersite purposes. There is no evidence that the reservation has ever been revoked. However, with the enactment of the Mining Claims Rights Restoration Act of 1955 (MCRRA), Pub. L. No. 84 ! 359, 69 Stat. 682, codified as amended at 30 U.S.C. §§ 621 ! 625 (1994), on August 11, 1955, all public lands reserved for powersite purposes, with certain exceptions not applicable here, were opened to entry under the general mining laws. Thus, at the time of location of the two claims at issue, the subject lands were open to entry under the general mining laws pursuant to the MCRRA and 43 C.F.R. Part 3730.

By letter dated July 16, 1996, BLM notified the Kroezes that the locators of placer mining claims were required by 30 U.S.C. § 35 (1994) and 43 C.F.R. Subpart 3842 to conform their claims, as nearly as practicable, to the United States system of public ! land surveys and not to include in their claims any more than 20 acres for each individual claimant. BLM thus indicated that the Kroezes would have to "either amend or relocate" their claims in order to bring them into conformance with the law. BLM also noted that the Kroezes had failed to mark their location notices so as to indicate that they encompassed powersite lands, as required by 43 C.F.R. Subpart 3734. 3/ It noted that, until the Kroezes did so, they were precluded by 43 C.F.R. Subpart 3736 from undertaking any exploration or mining activity until 60 days after properly ! marked notices

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3/ BLM indicated in its July 16, 1996, letter, at page 2, that the Kroezes could comply by simply submitting a location notice "marked 'PL 359 Claim' at the top."

were filed with BLM. BLM thus stated: "As a consequence of your improper * * * filing, you will need to suspend any mining activity on the claims, other than casual use or non ! surface disturbing activity, until such time that you have perfected your locations consistent with applicable law." (BLM letter of July 16, 1996, at 1.) No deadline for either amendment/ relocation or filing a properly ! marked location notice was established by BLM.

Allen C. Kroeze responded at length to BLM's July 16, 1996, letter by letter dated July 29, 1996. Kroeze asserted first that, since the two claims had been "filed" by a "family association consisting of Allen Kroeze, Charles Kroeze, Elmer Kroeze, Matthew Kroeze, Debbie Kroeze, and Kristi Rutledge," the acreage of each claim did not exceed the maximum allowable acreage permitted by 30 U.S.C. § 35 (1994) and 43 C.F.R. Subpart 3842. (Letter to BLM, dated July 29, 1996, at 1.) Recognizing, however, that the location notices referred only to Allen C. and Charles M. Kroeze, Kroeze explained:

> Because of space limitations in standard forms, Allen Kroeze and Charles Kroeze were listed on the face sheet using the standard qualifier "dba" for "doing business as" Red Mountain Mining Company [(Red Mountain)] as collective identification of six individual members of the family. The four additional family members are enlisted in annexes, in accordance with standard procedure for such documents, and in accordance with good business practi[c]e.

Id. Kroeze also stated that the claims had been "recorded in accordance with [the] standard method of surveying in use routinely with [USFS] and [BLM]." Id. at 2. He maintained that all of this was known to "cognizant officials" with USFS and BLM, and that they had repeatedly "certified" that the Kroezes were in compliance with applicable law. 4/ Id.

In its October 1996 Decision, BLM declared the Liberty 96 and Howson Creek No. 1 placer mining claims null and void "for failure to diligently prosecute the mining claim locations consistent with the general mining law, the Mining Claims [Rights] Restoration Act of August 11, 1955 (P.L. 359), and the applicable regulations," because the Kroezes had "failed to take the action necessary to remedy [the] deficiencies" noted

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4/ To the extent that Kroeze asserted that he had been assured that the two claims were in compliance with applicable law, he raised, and on appeal continues to raise, a claim that the Department is estopped to now conclude otherwise. See also Letter to Board from Allen C. Kroeze, dated Jan. 30, 1997, at 1 ! 2. However, estoppel will not lie in this case since Kroeze has nowhere identified any affirmative misstatement by BLM, or for that matter USFS, contained in an official written decision. Raymond A. Naylor, 136 IBLA 153, 156 (1996).

in its July 1996 letter, by amending or relocating and recording the claims in the manner set forth therein. (Decision at 2.) Allen C. Kroeze timely appealed from the October 1996 Decision.

In his Notice of Appeal/SOR, Appellant does not assert that he complied with BLM's July 1996 letter by amending or relocating the claims so that they conformed with the United States system of public ! land surveys and encompassed no more than 20 acres for each individual claimant, and by filing a location notice with BLM that was properly marked to indicate that the land claimed was subject to a powersite reservation. Nor is there any evidence in the record to that effect. Rather, Appellant indicated that the location and recordation of the claims were in accordance with "Laws enacted by Congress," and that, in any case, BLM's Decision declaring the claims null and void is "illegal" because BLM "only ha[d] a 90[!]day period to raise objections." 5/ (Notice of Appeal/SOR at 1.)

At the outset, we note that Appellant does not identify any statutory or regulatory provision that precluded BLM from raising any "objection" to the location or recordation of a mining claim after 90 days, whether from the date of location or recordation of the claim or any other date. Nor are we aware of any such restrictive provision. Rather, it is well established that, until a patent issues from the United States, BLM may raise any applicable deficiency in the location, recordation, or maintenance of a mining claim so that the Department of the Interior may properly fulfill its duty to see that "valid claims [are] recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920); see United States v. Knoblock, 131 IBLA 48, 78, 101 I.D. 123, 139 (1994).

We thus turn to the substantive requirements the claimants are said to have violated, starting with the location requirements regarding placer mining claims.

[1] The applicable statute, 30 U.S.C. § 35 (1994), provides that "all placer ! mining claims * * * shall conform as near as practicable with the United States system of public ! land surveys, and the rectangular subdivisions of such surveys." See 43 C.F.R. §§ 3842.1 ! 2(b)

5/ Appellant also asserts that BLM's determination that the claimants had failed to comply with the location/recordation requirements was based on a "misrepresentation" by USFS. (Notice of Appeal/SOR at 1.) He does not identify, and we cannot find, any misrepresentation by USFS. Moreover, BLM clearly took action in the present case based on its own review of the record, and without any reliance on any representation made or any information supplied by USFS. We also note USFS recognized that BLM alone is "responsible" for determining whether the claimants had satisfied the location/recordation requirements. (Letter to Appellant from Forest Supervisor, Wenatchee National Forest, USFS, dated Aug. 13, 1996, at 1.)

and 3842.1 ! 5. In addition, the statute provides that "no [placer] location shall include more than twenty acres for each individual claimant," 30 U.S.C. § 35 (1994), and that such a location shall not exceed a total of 160 acres in the case of an association of claimants, 30 U.S.C. § 36 (1994). See 43 C.F.R. § 3842.1 ! 2(a) and (b); United States v. Brookshire Oil Co., 242 F. 718, 721 (S.D. Cal. 1917); Owyhee Calcium Products, Inc., 72 IBLA 235, 238 (1983), aff'd, Owyhee Calcium Products, Inc. v. Watt, No. 83-1245 (D. Idaho Sept. 5, 1984). In the latter case, the permissible size of the claim is "dictated by the number of parties in the association." Alumina Development Corporation of Utah, 77 IBLA 366, 369 (1983). As the court said in Rooney v. Barnette, 200 F. 700, 705 (9th Cir. 1912): "There may be a less [sic] number than eight; but, where that is the case, there must also be a less quantity of ground located, corresponding to the equivalent of a less number of individual locat[or]s." Thus, "a location by two persons ca[nn]ot exceed 40 acres." 43 C.F.R. § 3842.1 ! 2(c).

Appellant reiterates on appeal that the subject claims were located "by Allen Kroeze and five other members of the Kroe[z]e family association doing business as the Red Mountain Mining Company," and that this fact was established when the location notices were filed with BLM:

> The Kroeze family association, dba Red Mountain Mining Company, properly executed authorities under signature warrant by family members, and such warrants were properly assimilated by citation and reference at the time of filing. Filing does not fail by reason of fact that local procedure utilized by Kittitas County, legal recorder of su[b]ject Claims, provides space on legal documents for the names of only two locators. Names of family members were properly recorded by assimilation through citation and reference[.] * * * All six principals were enlisted in every document where legally required[.]

(Letter to Board, dated January 30, 1997, at 1, 10.)

We are not persuaded that the claims were located by the six members of the Kroeze family, acting collectively either as six individuals or as Red Mountain. 6/ The location notices filed with BLM on January 8, 1996,

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6/ It appears that Red Mountain was not a duly constituted corporation, under Washington State law, when the subject claims were located. The record contains a copy of "Articles of Incorporation of Red Mountain Mining Co., Inc." (Articles), which was filed with BLM on Jan. 8, 1996, with the location notices. It was signed by Allen C. and Charles M. Kroeze, as the "Incorporators," on Dec. 20, 1995, and purportedly mailed to the State on that date. (Articles at 7; see Claim Journal at 1.) Thus, the corporation was seemingly not in existence at the time of location on Dec. 13 and 21, 1995. In any case, Appellant has emphatically stated that the claims were not located by a corporation, but rather that they were or will be transferred to a corporation after location.

identified, in accordance with WASH. REV. CODE ANN. § 78.08.100 (Michie 1996) and 43 C.F.R. § 3833.1 ! 2(b), only Allen C. and Charles M. Kroeze as the "Locators" of the claims. Neither document mentioned any of the other members of the Kroeze family or Red Mountain or indicated that either of the named individuals was acting on behalf of anyone else or Red Mountain. See Donald D. Hall, 95 IBLA 33, 34 ! 35 (1986); Owyhee Calcium Products, Inc., 72 IBLA at 236, 239 (citing 43 C.F.R. § 3832.1 ("Agents may make locations for qualified locators")); Rundle v. Republic Cement Corp., 341 P.2d 226, 227 (Ariz. 1959); 1 Am. L. of Mining § 31.05 (2d ed. 1995). Nor is there any evidence that the named individuals were authorized to act on behalf of anyone else or Red Mountain. See 1 Am. L. of Mining § 31.05 (2d ed. 1995); 58 C.J.S. Mines and Minerals § 29(a) (1948).

We recognize that Appellant also filed with BLM on January 8, 1996, along with the location notices, copies of "Notice[s] of Intent" dated December 12, 1995, which were signed by Allen C. and Charles M. Kroeze and addressed to the District Ranger, Cle Elum Ranger District, Wenatchee National Forest, USFS. These notices stated that the two Kroezes, "doing business as RED MOUNTAIN MINING COMPANY," intended to "establish and hold" the two claims at issue here and to undertake mining operations, consisting of the extraction and removal of "glacial till, river run, rip ! rap, unsorted sand and gravel, and residual gold findings," which would annually disturb no more than 1/4 acre of land on each claim, and related activity. There was no identification of any individual, other than Allen C. and Charles M. Kroeze, doing business as Red Mountain, in the Notices of Intent. 7/ Thus, even if we assume that the location notices

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fn. 6 (continued)
(Letter to BLM, dated July 29, 1996, at 1, 2; Letter to the Secretary, dated Aug. 22, 1996, at 4.) If the claims had originally been located by a corporation, it would have been restricted to 20 acres. United States v. Toole, 224 F. Supp. 440, 456 (D. Mont. 1963); United States v. Multiple Use, Inc., 120 IBLA 63, 107 (1991); Alumina Development Corporation of Utah, 77 IBLA at 369; Owyhee Calcium Products, Inc., 72 IBLA at 238; 1 Am. L. of Mining § 32.04[1][b] (2d ed. 1996) at 32 ! 34.

7/ We note that the Notice of Intent filed with respect to the Liberty 96 claim did state that it was filed by "Charles M. KROEZE and Allen C. KROEZE ET UX[.], doing business as RED MOUNTAIN MINING COMPANY." (Notice of Intent, dated Dec. 12, 1995, at 1 (emphasis added).) Neither wife is identified anywhere in the document. Further, below the signatures of the two Kroezes at the end of the document, their names are printed with the notation "Doing business as RED MOUNTAIN MINING COMPANY." Id. at 4. In addition, the reference to "ET UX[.]" does not appear on the Notice of Intent filed with respect to the Howson Creek No. 1 claim, which consistently states that Allen C. and Charles M. Kroeze do business as Red Mountain. We thus conclude that no other individual does business as Red Mountain.

were filed on behalf of Red Mountain, the Notices of Intent confirm that they were filed only on behalf of Allen C. and Charles M. Kroeze. 8/

We thus conclude that, absent any evidence to the contrary, the locations of the two placer mining claims were made by Allen C. and Charles M. Kroeze. 9/ Owyhee Calcium Products, Inc., 72 IBLA at 239; Samuel P. Barr, Sr., 65 IBLA 167, 168 (1982); Clayton S. Hale, 62 IBLA 35, 36, 37 (1982). Since the two claims were each located by two individuals, each could encompass only 40 acres, i.e., 20 acres "for each individual claimant." 30 U.S.C. § 35 (1994). Appellant does not dispute the fact that each of the claims encompasses more than 40 acres, as demonstrated by the acreage reflected on the map submitted with the location notices. 10/ Thus, we conclude that, at the time of location, both claims exceeded the statutory acreage limitation.

Because BLM concluded that the excess acreage was included in good faith, it provided notice to Allen C. and Charles M. Kroeze in a July 16,

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8/ We find only two references in the case files to the other four members of the Kroeze family, identified by Appellant in his July 29, 1996, letter to BLM. The first is in the "MINUTES FOR BOARD MEETING OF RED MOUNTAIN MINING COMPANY" (Minutes). That document, which contains the minutes of the "initial" meeting of the Board of Directors of the Red Mountain Mining Company, Inc. (Red Mountain, Inc.) on Feb. 18, 1996, identifies the six members of the Kroeze family only as directors, officers, and/or shareholders of Red Mountain, Inc. (Minutes at 3.) In addition, it was not filed with the location notices, but was instead mailed to BLM on Feb. 20, 1996, and received by it on Feb. 23, 1996. Thus, the document cannot be considered an "annex" to those notices. (Letter to BLM from Appellant, dated July 29, 1996, at 1) or to have been "properly assimilated by citation and reference [with those notices] at the time of filing." (Letter to Board from Appellant, dated Jan. 30, 1997, at 10.) Moreover, there is no indication in the Minutes that the two claims at issue here were located on behalf of the six members of the Kroeze family or Red Mountain. At best, they state that the Board of Directors had approved a plan of operations for the claims, and indicated that operations would be conducted by Red Mountain, Inc. (Minutes at 2 ! 3.) Second, we find the signatures of all six members of the Kroeze family, as "owner[s]" of the claims, on Waiver Certifications, filed with BLM on Mar. 13 and Aug. 30, 1996, pursuant to section 10101(d) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f(d) (1994). However, this does not establish that the six individuals were original locators of the claims.

9/ We find no disputed question of fact regarding the identity of the locators of the claims that would require a decision only after notice and an opportunity for a hearing. Big Horn Limestone Co., 46 IBLA 98 (1980).

10/ The acreage of the claims is also evident in the description of their dimensions in the location notices. Both claims are described as being 2,640 feet in length, with end lines of 1,200 and 1,600 feet (Liberty 96) and 1,600 and 2,000 feet (Howson Creek No. 1).

1996, letter to amend or relocate the claims so as to bring them into compliance with the acreage limitation of 30 U.S.C. § 35 and 43 C.F.R. § 3842.1!2. However, Allen C. and Charles M. Kroeze failed to amend or relocate the claims in the 90 days between issuance of the July 16 letter and the October 18 Decision, and failed to request an extension of the time so that they could comply. Therefore, we hold that BLM properly declared the claims void in their entirety. Although BLM, in its July 16 letter, set no time limit on the proper location of the claims, we conclude that it provided ample time for the Kroezes to bring them into compliance with the applicable law and regulation before taking adverse action.

In addition, we conclude that the claims did not conform as near as practicable with the United States system of public!land surveys where they were not "laid out in [a] rectangular shape along the regular subdivisions of one or more sections," and there is no evidence that it was not practicable to do so. (1 Am. L. of Mining § 32.04[1][c] (2d ed. 1996) at 32!35; see MT (Master Title)/Use Plat, T. 22 N., R. 14 E., Willamette Meridian, Kittitas County, Washington, dated Aug. 6, 1990; United States v. Haskins, 59 IBLA 1, 97, 98, 88 I.D. 925, 973, 974 (1981), aff'd, Haskins v. Clark, No. CV!82-2112!CBM (C.D. Cal. Oct. 30, 1984); United States v. Henrikson, 70 I.D. 212, 220 (1963), aff'd, Henrikson v. Udall, 229 F. Supp. 510 (N.D. Cal. 1964), aff'd, 350 F.2d 949 (9th Cir. 1965), cert. denied, 384 U.S. 940 (1966); Fred B. Ortman, 52 L.D. 467, 468, 470!71 (1928); Ventura Coast Oil Company, 42 L.D. 453, 454 (1913) ("[T]he law contemplates that placer claims upon surveyed lands shall, if practicable, conform to the subdivisions of the public surveys"); 1 Am. L. of Mining § 32.04[1][c] (2d ed. 1996).) Nor does Appellant present any persuasive evidence that it was not practicable to do so. 11/

However, this defect does not automatically render the claims void, but rather is treated as curable. Fred B. Ortman, 52 L.D. at 471. Thus, in its July 16, 1996, letter, BLM properly afforded Allen C. and Charles M. Kroeze the opportunity to bring the claims into compliance with the conformity requirement of 30 U.S.C. § 35 and 43 C.F.R. § 3842.1!2, by amending or relocating the claims. They made no effort to do so at any time during the over 90 days following issuance of the July 16 letter and before BLM issued its October 18, 1996, Decision. Again, BLM provided ample time for the Kroezes to bring their claims into compliance with the applicable law and regulation before taking adverse action.

11/ In a letter to the Secretary dated Aug. 22, 1996, Appellant stated that, rather than encompassing 10!acre subdivisions, the subject claims used, as their western boundary, a "dedicated road right!of!way" that had been "previously surveyed, platted, and withdrawn." While we do not doubt the existence of the road right!of!way, we find no evidence that the land encompassed thereby was "withdrawn," or any other reason why the claims could not have covered the right!of!way and land on either side. See MT/Use Plat, T. 22 N., R. 14 E., Willamette Meridian, Kittitas County, Washington, dated Aug. 6, 1990.

We thus hold, in these circumstances, that BLM properly declared the two claims void for failure to conform them as near as practicable with the United States system of public ! land surveys.

[2] Next, we address the requirement that the owner of a placer mining claim on public land subject to a powersite reservation shall mark the notice of location "to indicate that it is being filed pursuant to the [MCRRA] of August 11, 1955." 43 C.F.R. § 3734.1(a); see 43 C.F.R. § 3833.5(c). This is clearly required even if the land has not been or is unlikely to be developed for power purposes. However, this is a purely regulatory requirement. Sections 2(b) and 4 of the MCRRA, as amended, 30 U.S.C. §§ 621(b) and 623 (1994), only require, in the case of a placer claim located on land subject to a powersite reservation, that a "copy of the notice of location" be "file[d] for record" with BLM within 60 days of location, and that no mining operations occur for 60 days after such filing. See United States v. Brown, 124 IBLA 247, 249, 250 (1992); Jack T. Kelly, 113 IBLA 280, 285 (1990); E.J. Belding, Jr., 109 IBLA 198, 207 ! 08, 96 I.D. 272, 277 (1989). Thus, BLM, in its October 1996 Decision, properly recognized that the failure by Allen C. and Charles M. Kroeze to appropriately mark their location notices was "not a fatal defect under the Statute (P.L. 359)." (Decision at 2.)

Further, failure to mark a location notice under the regulations only, delays a claimant's right to undertake mining. Thus, 43 C.F.R. § 3734.1(a) provides that the "[f]ailure to so mark the location certificate [or notice] will delay the procedures to authorize mining under [S]ubpart 3736 [of 43 C.F.R.]." 12/ Correspondingly, 43 C.F.R. § 3736.1(b) states only that "[u]pon receipt of a notice of location * * * filed in accordance with [43 C.F.R.] § 3734.1," BLM will initiate the process for authorizing mining by deciding whether placer mining operations may substantially interfere with other uses of the affected lands. (Emphasis added.) Reading the two regulations together, we construe the underlined phrase to mean the "fil[ing]" of a location notice marked in the manner specified by 43 C.F.R. § 3734.1(a).

The rationale for the regulatory "mark[ing]" requirement would seem to be that BLM has no reason to initiate the authorization process until it is aware that a particular location notice relates to a placer mining claim located on land subject to a powersite reservation. While that fact could

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12/ The "procedures" involve an initial determination by BLM whether placer mining operations "may" substantially interfere with other uses of the affected lands, 43 C.F.R. § 3736.1(b), and, in the event of an affirmative finding, a public hearing, following notice to the claimant and the public, and a decision by an Administrative Law Judge, subject to the right of appeal to the Board, regarding whether such operations should, by appropriate order, be permitted, permitted subject to required restoration, or prohibited, 30 U.S.C. § 621(b) (1994) and 43 C.F.R. § 3736.2. See United States v. Brown, 124 IBLA 247 (1992); USFS v. Milender, 104 IBLA 207, 95 I.D. 155 (1988).

be easily ascertained by BLM were it to look at the relevant master title plat, we have long held that BLM is under no duty to determine the availability of the land claimed or any restrictions thereon when a location notice is filed or at any particular time thereafter. Hugh B. Fate, Jr., 86 IBLA 215, 227 (1985). Further, such a distinguishing mark is especially necessary now where, under section 314(b) of FLPMA, a copy of the location notice must be filed with BLM in the case of every claim. See United States v. Brown, 124 IBLA at 251. Therefore, absent specific notification by the claimant, at the time of recordation, by marking the location notice, months or even years might elapse before BLM determined that his placer claim was located on land subject to a powersite reservation and thus initiated the process to determine whether to permit mining operations. Thus, the onus is placed on the claimant, who is making the entry and presumably has researched the availability of the land prior to location, to inform BLM, at the time of recordation, whether the claim was located on such land.

In the present case, BLM was aware, not long after the Kroezes filed their location notices on January 8, 1996, that the lands encompassed by their claims were subject to a powersite reservation. On May 20, 1996, BLM received a May 7, 1996, letter from the District Ranger, which stated that the two claims were "located inside the Lake Cle Elum powersite withdrawal" and asked BLM to determine whether the "withdrawal" was still in effect and, if appropriate, to "initiate P.L. 359 proceedings." The Chief, Realty Services Section, Oregon State Office, BLM, responded by letter dated June 12, 1996, stating that the "withdrawal" was still in effect and that "Public Law 359 is applicable." See MT/Use Plat, T. 22 N., R. 14 E., Willamette Meridian, Kittitas County, Washington, dated Aug. 6, 1990. We further note that Appellant filed a May 20, 1996, letter with BLM on May 24, 1996, in which he stated that the two claims "were at one time, or are, subject to restrictions pursuant to Lake Cle Elum power site withdrawal." 13/ Thus, it is clear that BLM knew, at the time it issued its July 16, 1996, letter, that any mining on the claims could take place only pursuant to the MCRRA and 43 C.F.R. Subpart 3736.

However, we cannot conclude that the Kroezes have ever satisfied the specific requirement of 43 C.F.R. § 3734.1(a) that their "location certificate[s] [or notices]" be marked to indicate that they were filed pursuant to the MCRRA. The rationale for this specific requirement is plainly that the filing of a properly ! marked location notice marks the commencement of the 60 ! day period provided under section 2 of the MCRRA in which the

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13/ Appellant explained that he was unsure whether the subject lands were still subject to the powersite "withdrawal," since he had found no "[n]otice" of it in BLM's "records of claimants for sites located [on the lands]" and the Kittitas County Planning Department had stated that BLM had "provided notice of termination of [the] * * * withdrawal." (Letter to BLM, dated May 20, 1996.) There is no indication that Appellant looked at BLM's MT/Use Plat for the subject township.

Secretary (through BLM) must decide whether to hold a public hearing to determine whether placer mining operations will substantially interfere with other uses of the land and thus whether to permit such operations. Indeed, the statute makes holding a public hearing together with a further automatic suspension of mining operations during the pendency of the hearing and issuance of an appropriate order, contingent on the Secretary's notification to the claimant by certified or registered mail of his intention to do so. 30 U.S.C. § 621(b) (1994); see 43 C.F.R. § 3736.1(b); United States v. Brown, 124 IBLA at 250; E.J. Belding, Jr., 109 IBLA at 208, 96 I.D. at 277. In turn, 43 C.F.R. § 3734.1(a) provides that such a filing will be deemed to have occurred, thus triggering the 60 ! day period, only when a properly ! marked location notice is filed.

We are not persuaded that the date of filing the location notice, regardless of whether it is properly marked, should be considered the triggering event since, in many cases, BLM will not immediately review the status of the land claimed and thus may not know that the land is subject to a powersite reservation. Consequently, it may inadvertently allow the 60 ! day period from that date to run without even considering whether there may be substantial interference with other uses. The result would be that, absent an automatic suspension, mining would be permitted at the end of that period in instances where it might in fact substantially interfere with other uses, but which BLM would initially be powerless to prevent. See United States v. Brown, 124 IBLA at 250; USFS v. Milender, 104 IBLA at 213 ! 14, 95 I.D. at 159. Rather, we conclude that the specific regulatory requirement of marking currently aids in fulfilling the longstanding purpose of the statutory requirement of filing. It suitably "advise[s]" BLM when placer claims are initiated on powersite reservation lands so that it may timely address whether to permit mining operations, especially considering the fact that the "most serious conflict between mining activities and other land uses occurs when placer mining and dredging operations are involved." United States v. Brown, 124 IBLA at 251 (quoting from S. Rep. No. 1150, 84th Cong., 1st Sess. (1955), reprinted in 1955 U.S.C.C.A.N. 3006, 3011).

In the present case, when BLM issued its July 16, 1996, letter, the Kroezes had clearly not filed properly ! marked location notices. Thus, BLM correctly indicated in that letter that it would not decide whether to hold a public hearing until they had done so. However, while we conclude that BLM could properly delay its determination regarding whether to permit placer mining operations on the claims in the absence of properly ! marked location notices, we can find no justification for declaring the claims null and void in that circumstance.

In its October 1996 Decision, BLM specifically invalidated the claims for "failure to diligently prosecute the mining claim locations consistent with * * * the [MCRRA], and the applicable regulations." (Decision at 2.) However, there is no statutory or regulatory requirement that a claimant file a properly ! marked location notice, and thus

take the first step in seeking permission to undertake mining, at any particular point in time during the life of his claim. Rather, he may simply hold and maintain the claim in accordance with applicable law. Nor is any adverse consequence imposed by statute or regulation for failure to file such a location notice other than to "delay" a decision whether to permit mining. 43 C.F.R. § 3734.1(a). The validity of the claim is not affected. Nor, without any statutory or regulatory underpinnings, can BLM establish a basis for invalidating a claim simply by expressly requiring such a filing and then waiting until the claimant fails to comply with that directive.

Thus, we reverse BLM's October 1996 Decision to the extent that it declared the subject claims void for failure to submit, in response to the July 16, 1996, letter, properly ! marked location notices.

We therefore conclude that BLM, in its October 1996 Decision, properly declared the Liberty 96 and Howson Creek No. 1 placer mining claims, ORMC ! 150735 and ORMC ! 150736, null and void for failure to comply with the location requirements of 30 U.S.C. § 35 (1994) and 43 C.F.R. § 3842.1 ! 2. To that extent, the Decision is affirmed.

All other errors of fact or law asserted by Appellant but not expressly addressed herein have been fully considered and rejected as either contrary to the facts or law or immaterial. Further, Appellant's Motions for Summary Judgement and for Orders to Show Cause and to Compel Disclosure are denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed in part and reversed in part.

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James P. Terry
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge